

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
LIND, KRAUSS, and PENLAND
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist TYLER C. FLINNER
United States Army, Appellant

ARMY 20140704

Headquarters, Fort Bliss
Michael J. Hargis, Military Judge (arraignment)
Timothy P. Hayes, Jr., Military Judge (trial)
Colonel Karen H. Carlisle, Staff Judge Advocate

For Appellant: Major Amy E. Nieman, JA; Captain Payum Doroodian, JA (on brief).

For Appellee: Major A.G. Courie III, JA (on brief).

23 March 2015

SUMMARY DISPOSITION

LIND, Senior Judge:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of one specification of failure to go to his appointed place of duty on divers occasions; four specifications of absence without leave from his unit; one specification of failure to obey a lawful order; one specification of damage to military property of a value of less than \$500.00; three specifications of wrongful use of controlled substances; one specification of wrongful distribution of a controlled substance; one specification of wrongful appropriation of property of a value of less than \$500.00; one specification of larceny of property of a value of less than \$500.00; one specification of larceny of military property of a value of less than \$500.00; and three specifications of housebreaking, in violation of Articles 86, 92, 108, 112a, 121, and 130 Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 886, 892, 908, 912a, 921, 930 (2012). The military judge sentenced appellant to a bad-conduct discharge, forty-two months confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1. Pursuant to a pretrial agreement, the convening authority approved only so much of the sentence as provided for a bad-conduct discharge, thirty-six months confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority also credited appellant with 145 days against the sentence to confinement.

This case is before the court for review pursuant to Article 66, UCMJ. Appellant submitted the case on its merits.¹ After review of the entire record, we find that Specification 2 (larceny of non-military property) and Specification 3 (larceny of military property) of Additional Charge III should be consolidated because appellant's providence inquiry establishes the property in both specifications was stolen at substantially the same time and place.

Appellant was convicted of, *inter alia*, the following two larceny specifications of Additional Charge III:

SPECIFICATION 2: In that [appellant] did, at or near Fort Bliss, Texas, between on or about 19 September 2013 and on or about 25 April 2014, steal duffle bags and other items, of a value less than \$500.00, the property of Private First Class [TH].²

SPECIFICATION 2: In that [appellant] did, at or near Fort Bliss, Texas, between on or about 19 September 2013 and on or about 25 April 2014, steal a M-4 Magazine Pouch, Individual first Aid Kit, and other items, military property, of a value less than \$500.00, the property of the U.S. Government.

During the providence inquiry, appellant told the military judge he unlawfully entered Private First Class TH's barracks room on 1 January 2014 and, at that time, stole the property listed in both specifications 2 and 3 of Additional Charge III.

"When a larceny of several articles is committed at substantially the same time and place, it is a single larceny even though the articles belong to different persons." *Manual for Courts-Martial, United States* (2012 ed.) [hereinafter *MCM*], pt. IV, ¶ 46.c(1)(i)(ii); *see also United States v. Gilchrist*, 61 M.J. 785, 788-89 (Army Ct. Crim. App. 2005). The *MCM* provides an example applicable to appellant's case: "[i]f a thief . . . goes into a room and takes property belonging to various persons, there is but one larceny, which should be alleged in one specification." *MCM*, pt. IV, ¶ 46.c(1)(i)(ii). This principle holds true even when personal property belonging to an individual and military property belonging to the United States government (although issued to the individual) are stolen at the same time and place. The fact that the President has prescribed enhanced penalties when military property is the subject of a larceny does not transform a single larceny of

¹ We have considered those matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find them to be without merit.

² The military judge amended Specification 2 of Additional Charge III to except the words "on divers occasions" before accepting appellant's plea to the specification.

military and non-military property at the same time and place into two separate larcenies. See *MCM*, pt. IV, ¶ 46.c(1)(i)(ii), 46.e(1)(a)-(b).

Application of Rule for Courts-Martial 307(c)(4) and of the factors in *United States v. Quiroz*, 55 M.J. 334, 338-39 (C.A.A.F. 2001) to the facts of this case leads us to conclude that Specifications 2 and 3 of Additional Charge III arose from a single larceny and the specifications are unreasonably multiplied for findings and sentence.

CONCLUSION

Specifications 2 and 3 of Additional Charge III are consolidated into Specification 2 of Additional Charge III as follows:

In that Specialist Tyler Flinner, U.S. Army, did, at or near Fort Bliss, Texas, between on or about 19 September 2013 and on or about 25 April 2014, steal a M-4 Magazine Pouch, Individual First Aid Kit, and other items, military property, of a value less than \$500.00, the property of the U.S. Government; and steal duffel bags and other items, of a value less than \$500.00, the property of Private First Class TH.

The finding of guilty of Specification 2 of Additional Charge III as consolidated is AFFIRMED. The finding of guilty of Specification 3 of Additional Charge III is set aside and that specification is dismissed. The remaining findings of guilty are AFFIRMED.

Reassessing the sentence on the basis of the error noted, the entire record, and in accordance with the principles of *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013) and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986), the sentence is AFFIRMED. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings set aside by this decision, are ordered restored.

Judge KRAUSS and Judge PENLAND concur.



FOR THE COURT:

A handwritten signature in black ink, reading "Malcolm H. Squires, Jr.".

MALCOLM H. SQUIRES, JR.
Clerk of Court